SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-255

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., Successor in Interest of Committee to Stop Route 7, et al, *Petitioners*

v.

JOHN A. VOLPE, et al, *Respondents*

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State defendants (Respondents) in the above-entitled action oppose the granting of the petitioners' request for review of this case by the United States Supreme Court. The State defendants in this action are the Commissioner of the Department of Transportation and the Deputy Commissioner of Transportation, Bureau of Highways, of the State of Connecticut.

RELATED CASE

This case involves a controversy over the proposed construction of 4.7 miles of relocated U.S. Route 7 between the City of Danbury and the Town of New Milford in the State of Connecticut. Construction of Route 7 in Connecticut from Norwalk to Danbury has been halted during the first phase of

Route 7 litigation by an injunction ordered by Judge Newman on July 7, 1972, *Committee to Stop Route* 7 v. *Volpe*, 346 F. Supp. 731 (Conn. 1972). Said injunction has continued without interruption from that date up to the present moment. This case arose when Judge Newman denied the plaintiffs' "Motion to Extend the Geographical Scope of Injunction" on May 10, 1974.

Contrary to the petitioners' claims, the issues in this case are not related to the issues in *Coleman* v. *The Conservation Society of Southern Vermont*, No. 74-1413, (so cited on page 2 of Petition), wherein a petition for a writ of certiorari has been filed by the Solicitor General on behalf of the United States. The decisions of the Second Circuit in these two cases are not in conflict and require no reconciliation. Certiorari should not be granted in this case which should not be considered jointly with *Coleman*.

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether the facts considered and found by the U.S. District Court (Newman, J.) were sufficient to support the court's conclusion that the Danbury-New Milford construction project under attack was not a "Federal action" within the meaning of NEPA and therefore an EIS for this specific portion need not be prepared prior to construction, when the court found that:

(a) the portion of new Route 7 between Danbury and New Milford has been eligible for federal funding (Petition 18a);

(b) eligibility for federal funding was preserved by the state officials who conducted corridor and design hearings pursuant to state requirements as rigorous as federal requirements, (P. 18a);

(c) less than $50,000 in federal funds were used in connection with the preliminary research and planning of the proposed road, (P. 18a);

(d) the proposed span of relocated highway has received FHWA approval to remain on the federal-aid primary system;

(e) the state highway officials elected to use only state funds for construction, (P. 21a, 22a);

(f) the proposed span has independent justification and is not dependent upon construction of the entire highway (P. 24a, 25a), and cannot be considered an indivisible part of a single highway, (P. 26a).

2. Whether the majority of the court below erred in deciding this case independently of *Coleman* v. *Conservation Society*, and

3. Whether the majority of the court below erred in affirming the decision of the Connecticut district court.

STATEMENT OF THE CASE

1. Route 7 before Relocation.

For many years prior to 1962, there existed a transportation corridor within the city of Danbury containing state routes No. 7, No. 6 and No. 202. In 1962 in order to provide an improved transportation system and to minimize the impact of this overlap construction on the Danbury city area, Route I-84 was constructed embracing for a distance of approximately 2.9 miles (Tr. p. 253) the same transportation corridor, (Tr. p. 164). In 1962, Route I-84 was constructed and completed with participating federal funds. As part of the same I 84 construction in 1962, two bridges, a stub end of Route 7 and ramp connections were built, (Tr. 69). This construction provided a connection to the then existing Route 7 and anticipated a

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possible reconstruction of Route 7 so that if it were to be ultimately reconstructed, further disruption of traffic on the I-84 corridor would not be necessary, (Tr. p. 62).

2. Relocation of Route 7.

In 1959 or 1961, the General Assembly directed the Connecticut Highway Department to study the need for reconstruction of Route 7 from Norwalk to the Massachusetts state line. This study was done in 1962 and reported back to the General Assembly in 1963 (Tr. 255). The traffic study by the state in 1962 indicated no need to reconstruct the existing Route 7 in its entirety north of New Milford, (Tr. p. 255). This decision has remained unchanged since then due to a constant low traffic volume observed and counted at the Kent control station on Route 7 since 1964 to this day, (Tr. 181, 256). The traffic study further indicated a need for a length of highway connecting Norwalk and Danbury.

The major justification for the Danbury-New Milford highway project was found to be in its service to local needs of traffic flow within the urban and town areas. The next greatest need was found to be a semi-local service, i.e. traffic flowing from outside the city or town area to inside the city or town area, (Tr. 172-174). The least important need was for vehicular traffic utilizing the entire length of corridor in one trip. If the highway from Norwalk to Danbury were relocated or not built at all, a separate need would still exist for the construction of Route 7 from Danbury to New Milford, (Tr. 169-170, 174). The same would be true as to the Norwalk to Danbury segment if the Danbury to New Milford segment could not or would not be built, (Tr. 172-174).

3. Federal participation.

The two specific projects between Danbury and New Milford under attack by the petitioners, namely 34-124 and

18-95, were initiated by the Connecticut Highway Department in 1965, (Tr. 239). The state highway department did not then and the Connecticut Department of Transportation (CONNDOT) does not now intend to use federal aid funds on these projects, (Tr. 211, 238, 265, Defs. Exh. 76). The Route I-84 hookup with Route 7 constructed in 1962-1963 was so constructed essentially as part of I-84. It connected I-84 with the existing Route 7 northward and was made compatible with a proposed relocated Route 7.

The only federal funds ever used by the state on the projects in question were highway planning and research funds. The use of such funds by CONNDOT for this portion of Route 7 is wholly consistent with the state's resolution to seek no federal funding on the highway project itself, (Lamm Affidavit).

CONNDOT had been following a pattern of procedure with all state projects which satisfied the requirement of eligibility for federal funding. CONNDOT followed this same pattern of procedure for the construction of the project here under attack, (Tr. 211). This was a unilateral observance by the State of Connecticut of hearing requirements which mirror federal requirements, for whatever purpose, without a reciprocal federal commitment in the form of some approval, (Lamm Affidavit).

As a condition to federal funding, program approval is required by 23 U.S.C. § 105 and 23 C.F.R. § 1.8. CONNDOT has never requested FHWA to program any portion of Route 7 north of the I-84 interchange for federal funding, except for the use of federal planning and research funds and federal funds contributed to the construction of I-84, (Siccardi Affidavit).

Construction work is now in progress for the portion of expressway from Danbury to New Milford and has passed the

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halfway mark of completion. The physical changes in the natural environment which already resulted from the road construction and Still River relocation are an accomplished fact and cannot be restored.

PRIOR PROCEEDINGS

The petition sets forth the prior proceedings (P. 10) in the order in which they occurred. However, we do not agree with the conclusions derived therefrom and set forth by the petitioners nor with their characterization that the proposed Danbury-New Milford project is a "fragment" of the project from Norwalk to Danbury, (P. 11).

Petitioners assert (P. 14-15) that neither the majority of the Court of Appeals nor Judge Newman made a finding "that the 4.7 mile Danbury-to-Brookfield leg of the expressway has any independent utility so as to justify its isolation for NEPA purposes." This assertion is not correct since Judge Newman explained at length in his decision (P. 23a-26a) the independent utility of this portion of Route 7 and concluded from the facts found by him that there was an "independent justification for the Danbury-New Milford portion." (P. 25a)

As stated by Judge Newman in his "Memorandum of Decision on Plaintiffs' Motion to Extend Injunction", (P. 14a), this case represents the "second phase of the Route 7 litigation in Connecticut requiring decision as to whether a proposed highway from Danbury to New Milford is a "Federal action" within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), in which event the preparation of an environmental impact statement (EIS) is required." In the first phase of this litigation, Judge Newman directed that "judgment will enter for the plaintiffs declaring that relocated Route 7 requires the preparation of an environmental impact statement by federal officials covering at least a span from Norwalk to Danbury, and enjoining defendants, their

agents and employees and those persons in active concert or participation with them from taking any steps to construct any portion of relocated Route 7 until such a statement has been prepared according to the provisions of § 102(2)(C) of the National Environmental Policy Act." *Committee to Stop Route 7, et al* v. *John A. Volpe, et al,* 346 F. Supp. 731 at 742 (1972).

In this case, Judge Newman's decision came after all parties presented their evidence during a full hearing upon the merits. His thorough decision detailed the findings of fact and conclusions of law reached by the Court in declaring that the proposed highway from Danbury to New Milford is deemed not to be a "Federal action" and that "an EIS for this specific portion need not be prepared prior to construction of the projects challenged by this motion to extend the prior injunction." *Citizens for Balanced Environment and Transportation, Inc., successor in interest of Committee to Stop Route 7, et al* v. *John Volpe, et al,* 376 F. Supp. 806, 814 (1974) (P. 27a). It is to be noted that Judge Newman here indicated in his decision that he was fully aware of the order entered by Judge Oakes for "preparation of an overall EIS for the entire Route 7 corridor", in *Conservation Society of Southern Vermont Inc.,* v. *Secretary of Transportation,* 362 F. Supp. 627, 638 (D. Vt. 1973).

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS

Petitioners make a sweeping assertion that the Second Circuit's decision in this case conflicts with holdings in the Fourth, Fifth, Eighth and Ninth Circuits, (P. 16), and refer to

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specific cases.[1] An examination of these cases reveals there is no merit to this assertion as each case cited in the petition can readily be distinguished from this case.[2]

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[1]*La Raza Unida* v. *Volpe*, 337 F. Supp. 221, aff'd 488, F. 2d 559, 562 (9th Cir. 1975), *cert. den.*, 417 U.S. 968 c.f., *Lathan* v. *Volpe*, 455 F. 2d 1111 (9th Cir. 1971).

Named Individual Members of the San Antonio Conservation Soviety v. *Texas Hy. Dpt.*, 446 F. 2d 1013 (5th Cir. 1971)

Indian Lookout Alliance v. *Volpe*, 484 F. 2d 11 (8th Cir. 1974)

James River v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 628, 632, aff'd, 481 F. 2d 1280 (4th Cir. 1974)

[2]a) In *La Raza*, the district court did not decide the case upon the issue of NEPA non-compliance but upon the responsibilities imposed by the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894; Section 502(3) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 502(3); Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f); Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, and all Federal regulations promulgated under each of said statutes. (Ibid p. 234)

However, the court considered NEPA's concern for the environment. The court ruled that "for the purpose of applying the various federal statutes and regulations, a federal-aid highway is any project for which the state has obtained location approval." (Ibid p. 227)

In our case "location approval" defined by *La Raza* and other cases was never requested or received by the State of Connecticut.

b) In *Named Individual Members of the San Antonio Conservation Society*, no environmental impact statement was prepared as required by NEPA although federal funding was allowed for two "end segments" which embraced the "third segment" containing parkland. The Circuit Court decided that such exclusion of the middle segment constituted non-compliance by the Secretary of Transportation with his statutory responsibilities under 23 U.S.C.A. § 138; 42 U.S.C.A. § 4332 and 49 U.S.C.A. § 1653(f).
The facts in our case are so dissimilar that *San Antonio* merits no further discussion.

c) In *Indian Lookout Alliance*, "location approval" was secured from the FHWA. For this reason, the court decided it "need not explore the earliest time NEPA becomes applicable" but must "resolve whether the scope extends to the whole system or the entire F-518 project." (Ibid p. 17) The court decided that the 14-mile segment of F-518-4 did not have the "requisite independent utility to be the appropriate segment to be covered by the Environmental Impact Statement", (Ibid p. 20).

In our case, no "location approval" was requested by the State of Connecticut and none was granted by the FHWA. Judge Newman found that the portion of highway from Danbury to New Milford had an independent justification and utility.

d) *James River* explained that the funds received by the State for planning and research "are apparently granted to help states fulfill the requirements of 23 U.S.C. §134 that any proposed highway within an urban area must be encompassed within a comprehensive transportation plan before federal funds can be allotted toward it. It by

In our case, the issues of federal funding, eligibility for federal funding and segmenting were carefully reviewed by Judge Newman as appears in his memorandum of decision, (P. 14a). The Second Circuit acknowledged Judge Newman's knowledge of the facts and correctness of his ultimate decision reached only after thorough evaluation by him of the facts and interpretation of the case law interpreting the application of NEPA.

II.

THE SECOND CIRCUIT IS NOT IN CONFLICT WITH ITSELF

The issue before Judge Newman was whether or not the Danbury-New Milford portion of the expressway was a "Federal action" within the meaning of NEPA. The issue before Judge Oakes in *Coleman* v. *Conservation Society* was the sufficiency of an EIS presented for purposes of dissolving the Route 7 injunction issued at an earlier date by the same court.

The Second Circuit entered the following statement in its decision in *Coleman* v. *Conservation Society* (508 F. 2d at 936, n. 43a):

> "In a recent per curiam opinion, this Circuit affirmed a district court determination relating to a portion of the

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no means follows, however, that every urban highway encompassed within a given plan will receive federal funds." (Ibid p. 628) The court attached no significance to the granting of such funds and concluded that upon the facts, federal statutory requirements need not be met prior to the construction of the project under attack as the plaintiffs failed to show sufficient federal involvement in the planning and construction of the Downtown Express, (Ibid p. 636).

Some of the facts in our case are parallel to the facts considered by the court in *James River*. Judge Newman cited *James River* in his memorandum of decision and concluded upon the facts found by him that the project under attack was not a "Federal action" within the meaning of NEPA. Judge Newman's final decision is in harmony with *James River* where as in our case, no "location approval" was requested or obtained from FHWA and only state funds are used for the project which received insignificant federal funds only for the purposes of planning and research.

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Route 7 corridor between Danbury and New Milford, Connecticut. Citzens for Balanced Environment and Transportation, Inc. v. Volpe, slip op. 5449 (2d Cir. Sept. 16, 1974). In that case the district court dealt solely with the question of whether or not there was federal action in the construction of the Danbury-New Milford portion of Route 7; it did not consider the issue of the necessity for an EIS covering the entire corridor. Thus, the affirmance by this Court of Judge Newman's specific finding does not preclude, and is unaffected by, the present affirmance of Judge Oakes' general findings."

III.

THE STATUTORY SCHEME FOR FEDERALLY-AIDED HIGHWAYS

In response to this portion of the Petitioners' Argument, respondents wish to correct a misstatement of the facts appearing therein, (P. 19).

Contrary to the statement of the petitioners, "design approval" was never requested by the State of Connecticut and was never granted by the federal highway authorities for the portion of expressway between Danbury and New Milford. Furthermore, "location approval" too has not been requested by the State nor granted by the federal government for this portion of highway under attack by the petitioners.[3]

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[3]These facts were presented to Judge Newman at the trial and were confirmed by the federal government in the affidavits of Lester P. Lamm, Assistant Federal Highway Administrator and Executive Director of the Federal Highway Administration and A. J. Siccardi, Division Engineer for the Connecticut Division of the Federal Highway Administration. These affidavits were presented to Judge Newman after the trial of this case at his request due to the non-participation of the federal defendants in this part of the proceedings.

IV.

THE SEGMENTATION ISSUE

In their argument, petitioners are in search of a formula which magically will contain all the ingredients of a balanced equation which will contain no error in establishing that a particular state project is but a "segment" of a "major federal action".

The cases which have discussed this "project splitting" theory analyze two factors:

a) The independent justification for the project, and b) the degree to which the Federal and State governments have formed a "partnership" prior to segmentation.

The first factor is a factual determination. In *James River*, supra, the court said "In order to determine, therefore, when a group of segments should be classified as a single project for purposes of federal law, a court must look to a multitude of factors, including the manner in which the roads were planned, their geographical locations and the utility of each in the absence of the other." (359 F. Supp. p. 611 at 635).

The project before this Court has always been treated as a separate independent project with its own independent justification and utility. Judge Newman found from all the evidence that "independent justification for the Danbury-New Milford portion is reasonable and not a sham for rationalization." (P. 25a)

The most important factor distinguishing the project in question from all the cases holding a State project to be a "Federal action" where Federal funds have not been committed is the absence of the Federal-State partnership. The justification for the eligibility theory of *La Raza Unida* cases and the segmentation theory of the *San Antonio* cases is that

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once embarked upon a Federal project a state should not be able to reverse itself in order to avoid Federal procedures and regulations. Since the intention to seek Federal funds is a difficult fact to prove, the courts have resorted to such factors as location approval, independent justification and Federal-State cooperation to make that determination the crucial factor.

The elements of the Federal-State partnership are absent in our case. Relocated Route 7 from Danbury to New Milford was planned as an independent state-funded project. It was joined with other portions of relocated Routes 7 and I-84 for convenience. There was no evidence presented to show that it was joined with such other projects for the purpose of obtaining or benefiting from federal funds. When the portion of relocated Route 7 from Norwalk to Danbury was enjoined by Judge Newman, the Danbury-New Milford project was set apart not to avoid NEPA or other Federal regulations, but because over the years, it was always planned as a separate state-funded project and needed to be constructed whether or not the remainder of relocated Route 7 was ever built south of Danbury, (Tr. pp. 169-170, 174). The same would be true as to the Norwalk to Danbury portion if the Danbury to New Milford project could not or would not be built, (Tr. pp. 172-4).

Judge Newman was satisfied that the evidence failed to demonstrate a federal-state partnership in the project from Danbury to New Milford. The express denial of such partnership voiced in the affidavit of Lester P. Lamm, Assistant Federal Highway Administrator and Executive Director of the Federal Highway Administration, cannot be dismissed and swept aside as valueless in establishing this key factor.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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